TSANG & ONG STOCKBROKERS (PTE) LTD

v.

JOSEPH LING KUOK HUA

HIGH COURT SABAH & SARAWAK, KUCHING
ZAKARIA SAM JC
[ORIGINATING SUMMONS NO: 24-168-96-III(II)]
24 NOVEMBER 2000

CIVIL PROCEDURE: *Reciprocal enforcement of judgments - Service of writ - Service by agent - Whether proper - Whether allowed - Whether judgment duly served - Whether court should consider validity of registered foreign judgment - Rules of the High Court 1980, O. 11 rr. 2, 6(2), O. 65 r. 2, O. 67 r. 7(3) - Rules of the High Court [Sing], O. 11 rr. 3(8), 4(2)(c), 6(3), O. 65 r. 2*

The plaintiff, a stockbroker of the Singapore Stock Exchange, filed a writ of summons and statement of claim in the Singapore High Court against the defendant who breached a share trading agreement when he failed to pay the losses indebted to the plaintiff. The plaintiff had also obtained an order in Singapore for service out of jurisdiction. The writ of summons and statement of claim were served on the defendant by the plaintiff's agent in Kuching, M/s Reddi & Co.

When the defendant failed to enter appearance, judgment in default of appearance was obtained in the Singapore High Court ('the Singapore judgment'). The Singapore judgment was subsequently registered and served as judgment of the High Court in Sabah and Sarawak. A notice of registration of the Singapore judgment had also been served on the defendant but he did not apply to have it set aside. Thereafter, bankruptcy proceedings were brought against the defendant when he defaulted on his agreement to settle. The defendant now applied to set aside the registration of the Singapore judgment.

The defendant argued that service by agent was bad in law as it was contrary to O. 65 r. 2 Rules of the High Court 1980 ('RHC'). The defendant also contended that the Singapore judgment was irregulary obtained as the service of the plaintiff's writ was not proper and therefore its registration in the High Court at Kuching was invalid and a nullity.

Held:

[1] There is no ruling laid down by the Supreme Court in *Sunkyong International Inc v. Malaysian Rubber Development Corporation Bhd* that foreign service of legal process in Malaysia cannot be effected by a local agent.

[1a] In this case, the plaintiff chose to effect service under O. 11 rr. 3(8) and 4(2)(c) of the Singapore Rules of the High Court to serve the Singapore judgment through a local agent. Such rules allow service by a method of service authorised by the law of that country for service of any originating process issued by that country. Service by local agent is a recognised mode of service by Malaysian courts. Therefore, the service of the Singapore judgment was good in law and the said judgment was duly served on the defendant.

[2] It was also not the function or duty of the instant court to consider the validity of the Singapore judgment. If the defendant was not happy with it he should go back to the Singapore High Court to challenge the validity of the said judgment.

[Defendant's application dismissed with costs.]

Case(s) referred to:

Anthinarayana Mudaliar v. Ajit Singh [1953] MLJ 229 ***(refd)***

Fortune Hong Kong Trading Ltd v. Cosco Feoso (Singapore) Pte Ltd [2000] 2 SLR 717 ***(refd)***

Sunkyong International Inc v. Malaysian Rubber Development Corporation Bhd [1992] 3 CLJ 1531 ***(refd)***

United Overseas Bank Ltd v. Wong Hai Ong [1995] 5 CLJ Supp 405 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 11 rr. 2, 6(2), O. 65 r. 2, O. 67 r. 7(3)

Rules of the High Court [Sing], O. 11 rr. 3(8), 4(2)(c), 6(3), O. 65 r. 2

For the plaintiff - Lim Lip Sze; M/s Reddi & Co
For the defendant - Ernest Chua; M/s Ernest Chua & Co

Reported by Raja Vishnu

JUDGMENT

Zakaria Sam JC:

The plaintiffs are stockbrokers and members of the Stock Exchange of Singapore Limited.

By an agreement (the account agreement) made on 15 January 1996 between the plaintiffs and the defendant, the defendant opened an account with the plaintiffs for the trading of securities in which the plaintiffs agreed to act for the defendant as a dealer for the purpose of buying and selling securities for the defendant.

On 14 February 1996 the plaintiffs purchased securities on the defendant's behalf, and on or before the due date, the defendant instructed the plaintiffs to sell the said securities on a contra basis and the defendant failed to make payment on the due date. As a result the plaintiffs exercised their right to and were forced to sell the said securities under Bye Law II Clause 4.7 of the Bye Laws of the Stock Exchange of Singapore Ltd. The said securities were sold at a loss. Consequently in breach of the account agreement, the defendant failed to pay the sum RM708,742.75 indebted to the plaintiffs.

The writ of summons and statement of claim was filed in the Singapore High Court *vide* Suit No. 1224 of 1996 on 5 July 1996. The plaintiffs obtained an Order in Singapore for service out of jurisdiction on 3 July 1996. The writ of summons and statement of claim were served on the defendant on 27 July 1996 by the plaintiffs' agent in Kuching, Messrs. Reddi & Co.

When the defendant failed to enter appearance within the period of 21 days, judgment in default of appearance was obtained against the defendant on 20 August 1996 in Singapore (after this referred to as the Singapore judgment). The Singapore judgment was subsequently registered as judgment of the High Court in Sabah and Sarawak pursuant to an order dated 5 October 1996. The order was served on the defendant on 25 November 1996.

The notice of the registration of the Singapore judgment was served on the defendant on 11 November 1996.

The defendant did not file any application to set aside the said notice within the period of 10 days as prescribed for in the notice pursuant to O. 67 r. 7(3) of the Rules of the High Court 1980.

The plaintiffs thereafter commenced bankruptcy proceedings against the defendant but was later withdrawn when the defendant agreed to settle the claim by way of monthly instalments.

When the defendant defaulted with his payment, a second bankruptcy proceedings was recommenced.

The defendant thereafter filed this application (encl. 20) to set aside the order of registration of the Singapore judgment on the grounds:

(1) That the plaintiffs has failed to comply with O. 65 r. 2 of the Rules of the High Court 1980 in the writ of summons in Singapore High Court Suit No. 1224 was not duly served on the defendant.

(2) That at all material times the defendant/judgment debtor did not appear before the Singapore High Court either by himself or through his advocate.

(3) That the registration of the Singapore judgment on 5 October 1996 is invalid and a nullity and that the enforcement of the said judgment would be contrary to public policy.

Preliminary Objection

At the outset of the hearing the learned counsel for defendant raised objection to the inclusion of the affidavit in reply by one Goh Chui Li (encl. 52) as it was filed out of time.

After a short argument the plaintiff withdrew encl. 52.

The counsel for the defendant then submitted that in the absence of encl. 52 all the assertions by the defendant as averred by him in his affidavit in reply (encl. 46) are deemed admitted.

With due respect I do not agree. I find the affidavit in opposition (encl. 10 23) by one Tan Boon Hai, the General Manager of the plaintiff is sufficient to oppose the defendant's application (encl. 20). Furthermore encl. 52 mostly cover point of law and not fact.

Upon the withdrawal of encl. 52 by the plaintiff, the defendant requested for costs of the preliminary objection but I am making no order as to costs.

The Issue

The first issue is whether the writ of summons in the Singapore High Court No. 1224 of 1996 was duly served on the defendant.

It is the defendant's case that the Singapore judgment was irregularly obtained as the service of the plaintiffs' writ was not proper and therefore the registration of the said Singapore judgment in the High Court in Kuching is invalid and a nullity.

It is the defendant's contention that the service by an agent is bad in law as it is contrary to O. 65 r. 2 of the Rules of the High Court 1980. The defendant is relying on the case of *United Overseas Bank Limited v. Wong Hai Ong* [1995] 5 CLJ 405 which ruled that the service of a foreign legal process through a private agent in Malaysia is not valid. The learned judge in that case referred to the Supreme Court decision of *Sunkyong International Inc. v. Malaysian Rubber Development Corporation Bhd.* [1992] 3 CLJ 1531 concluded that:

> I am of the view that foreign countries should hearken to the decision in *Sunkyong International Inc. v. Malaysian Rubber Development Corporation Bhd* and should not make valid any method of service of legal process that *Sunkyong International Inc. v. Malaysian Rubber Development Corporation* had ruled invalid.

He further ruled that:

> In my view there is absolutely no reason why service of legal process of Singapore or Brunei Darussalam cannot and should not be done through the special provision of the Singapore O. 11 r. 3(8) which is by our judicial officer and that, in my view, is the only permissible method of service other than the method under O. 65. The fact that service by an agent is not expressly prohibited does not mean that the Singapore O. 11 r. 3(8) need not be complied with. That provision and O. 65 are enacted for observance and to be ignored, and, implicitly, all other methods or service will not be allowed since it amounts to the exercise of the jurisdiction of the Singapore Courts in Malaysia. Therefore, in my respectful view, the said opinion expressed in this regard by Malaysian High Court Practice vol. 1. 1998 edn., p. 4424-4454 is not correct. Insofar as the Singapore O. 11 r. 3(8)(a) is concerned, it cannot be read as allowing the service of the writ in Malaysia by a private agent as that is only allowed in Malaysia in respect of processes originating in Malaysia and not to foreign process.

Reading through *Sunkyong*'s case I could not find any ruling laid down by the Supreme Court that the foreign service of legal process in Malaysia could not be effected by a local agent.

In *Sunkyong*'s case a local defendant filed a summons in chamber and was heard *ex parte* before the learned registrar, where the local defendant obtained an order, *inter alia*:

i) That the local defendant be at liberty to issue a third party notice against the foreign defendant (a company incorporated in the USA, therefore a resident out of jurisdiction)

ii) That the local defendant be at liberty to serve the said third party a notice on the foreign defendant at a specific address in New York, USA through the agents of the local defendant there.

It was held by the Supreme Court that:

> It was common ground and we accepted that in the USA, there did not subsist the Civil Procedure Convention, therefore O. 11 r. 6(2) applied. The service of the notice of writ herein would have to be effected through the Government of the USA or through our Malaysian consular authority contrary to what was ordered and done in this case, as stated above.
>
> The rationale behind this prescribed method of service is of course that our courts do not exercise their judicial powers beyond their territorial limits, and further service of judicial process in a foreign country, to use the grave words of Lord Denning in *Afro Continental Nigeria Ltd v. The Meridian Shipping Co SA* is an exercise of sovereignty in that country, which can only be done with the consent of that country.

The interpretation of the Supreme Court in the abovesaid case was confined to O. 11 r. 6(2) of the Rules of the High Court 1980. Therefore the provision of O. 11 r. 2 must be strictly adhered to.

Sunkyong's case was referred to in *Fortune Hong Kong Trading Ltd. v. Cosco Feoso (Singapore) Pte. Ltd.* [2000] 2 SLR 717 where the Singapore Court of Appeal made this observation:

> The first thing to note is that both *Sunkyong* and *Chow* involve the interpretation of the respective provisions governing the service of process out of jurisdiction and they do not concern the interpretation of O. 65 or its Malaysian equivalent. It appears to us that the primary concern of the judges in these cases was that the procedure set out in O. 11 prescribing the methods of service of process in a foreign jurisdiction must be strictly adhered to. Understandably, they were sensitive to the possibility that the foreign state might view such a service of process as being an encroachment upon its sovereign rights.

The Singapore Court of Appeal in that case also discussed O. 65 r. 2 of Singapore Court Rules (which is similar to our O. 65 r. 2) where they held that:

> Giving O. 65 r. 2 its plain and ordinary meaning, the rule applied only where a letter of request for service from a foreign Court or tribunal was received by the Minister for Law and was subsequently sent by him to the Supreme Court with an intimation that it was desirable that effect should be given to the request. In cases where no such letter of request was received, r. 2 simply had no application. Order 65 r. 2 was not intended to govern the service of all foreign processes in Singapore issued by the courts or tribunals of non-convention countries.

The Singapore Court of Appeal also touched on the application of O. 11 r. 4(2) (which is similar to our O. 11 r. 6(2)) except that our provision do not have r. 6(3)) where it was held that:

> Order 11 r. 4(2) was another strong indication that Singapore did not regard the service of process in a foreign jurisdiction as an encroachment upon the sovereignty rights of that country so long as it was served in accordance with any method of service authorised by its local laws for service of its originating process. If Singapore did not insist on service out of jurisdiction through official channels, it could not have been the intention of O. 65 r. 2 that service of all foreign process in Singapore must be effected through the official means as provided in that rule.

The restrictive nature of our O. 11 r. 6(2) is acknowledged by the Supreme Court in *Sunkyong*'s case where they made this observation:

> It is possible that the Civil Procedure Convention if held or signed in future could contain methods of service less demanding on our foreign missions that as set out in O. 11 r. 6(2), eg, even by the method of service as ordered by the learned registrar and upheld by the learned judge, with out present world having shrunk in these days and times and boundaries of nations consequently having been regarded with a more realistic pitch of fever.

It is interesting to note that the abovesaid observation has turned into reality by the amendment to O. 11 r. 2 which introduced 'the service by the plaintiff or his agent whenever authorised by the law of that country' *vide* P.U.(A) 342/2000 effectively from 22 September 2000.

In the application before me today the plaintiffs prefer the mode of service under O. 11 r. 3(8) and 4(2)(c) over O. 65(2) of Singapore Rules of Court to serve their Singapore judgment by using the service of their local agent in Kuching.

Order 11 r. 4(2)(c) of SCR allows "the service by a method of service authorised by the law of that country for service of any originating process issued by that country."

Service by a local agent (other than by court process server) is a recognised mode of service by our court here. Therefore the service of the Singapore judgment is good in law. Hence the said judgment is duly served on the defendant.

It is also not the function or duty of this court to consider the validity of the Singapore judgment. If the defendant is not happy with it he should go back to Singapore High Court to challenge the validity of the said

judgment. In the event he succeeded there the order of registration of the said judgment would be revoked accordingly. It is pertinent to note that the defendant had not to date done anything about this.

Unless that is done, 'A judgment or decree pronounced by the court of a foreign country will be treated and acted upon here as final, notwithstanding any irregularity of procedure under the local law, provided the foreign court had jurisdiction over the subject matter and the person brought before it, and the proceedings do not offend against natural justice'. (*Anthinarayana Mudaliar v. Ajit Singh* [1953] MLJ 229)

The plaintiffs also raise the issue of estoppel whereby they contended that:

i. The defendant did not apply to set aside the registration of the judgment when he has every opportunity to do so.

ii. When the first bankruptcy proceeding was filed against him, the defendant did not file any application to set aside the order of registration of the judgment.

iii. When the said bankruptcy proceeding was filed the defendant had proposed settlement and had in fact made some payment towards the amount outstanding.

As such the defendant is now estopped from proceeding herein to set aside the order.

Again I wish to stress here that the issue of estoppel is not the concern of this court. These issues should be tackled at source, that is the Singapore High Court.

I hereby dismiss the defendant's application (encl. 20) with costs to the plaintiffs to be taxed unless agreed.